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Supreme Court of the United States

October Term, 1958.

No. 825.

DAVE FLEISCHER, individually and as trustee in dissolution of FLEISCHER STUDIOS, Incorporated,

Petitioner,

v.

ROBERT S. BENJAMIN and ARTHUR B. KRIM, as the "parent" of UNITED ARTISTS CORPORATION, PHILLIPS, NIZER, BENJAMIN & KRIM, A.A.P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., and PARAMOUNT PICTURES CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit.

GUSTAVE B. GARFIELD,
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122 East 42nd Street,
New York, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1959

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3. For the District Court and Court of Appeals to have permitted Louis Phillips, the lead lawyer for the motion picture industry, to try the merits of the case in chief on affidavits in opposition to the motion to enjoin his participation in the case in the face of the "irrebuttable inference" rule of prejudice adopted by said Courts at his insistence as such lead counsel, is shocking to the "Equal Justice for All" principle. It would appear that the rule is enforced when great and powerful interests require its enforcement and relaxed when it is detrimental to them 22

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5. The purchase by Attorneys Krim and Benjamin through their subsidiary United Artists Corporation of a substantial block of stock constituting working control of defendant Associated Artists Productions, Inc., is a clear violation of Canon 10 of the Canons of Professional Ethics. It is champertous, contrary to public policy and this Court has power and duty to enjoin its consummation at the suit of an aggrieved party such as the plaintiff herein 31

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b.) The purchase by Attorneys Krim and Benjamin through their subsidiary, United Artists, is champertous and against public policy and the consummation of the purchase should be enjoined by this Court 33

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Supreme Court of the United States

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No.

DAVE FLEISCHER, individually and as trustee in dissolution of Fleischer Studios, Incorporated,
Petitioner,

v.

ROBERT S. BENJAMIN and ARTHUR B. KRIM, as the "parent" of United Artists Corporation, PHILLIPS, NIZER, BENJAMIN & KRIM, A.A.P., Inc., ASSOCIATED ARTISTS PRODUCTIONS, Inc., and PARAMOUNT PICTURES CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit.

Dave Fleischer, individually and as trustee in dissolution of Fleischer Studios, Incorporated, a Florida corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Second Circuit, dated February 20, 1959, which by a divided vote, Moore, J., dissenting, dismissed the appeal of the petitioner as non-final and unappealable two orders as follows: (1) An order of the United States District Judge Edmund L. Palmieri dated January 8, 1958, which denied the petitioner's motion for a preliminary and permanent injunction restraining Robert S. Benjamin and Arthur R. Krim, attorneys in a pending action for defendant Paramount Pictures Corporation, from acquiring directly or indirectly through their control of United Artists Corporation of which they are the "parent" under Securities & Exchange regulations, any interest in the subject mat-

ter of a lawsuit pending in the United States District Court for the Southern District of New York between petitioner as plaintiff and Paramount Pictures Corporation, *et al.*, defendants, in violation of Canon 10 of the Canons of Professional Ethics and (2) An order of United States District Judge William B. Herlands made in the same action, dated April 25, 1958, which denied the petitioner's motion for a permanent injunction restraining the law firm of Phillips, Nizer, Benjamin & Krim of which Louis Phillips, Louis Nizer, Robert S. Benjamin and Arthur R. Krim are partners, from appearing in said action as the attorneys for Paramount Pictures Corporation, *et al.*, defendants, because of their prior representation of plaintiff in substantially related matters, in violation of Canons 6 and 37 of the Canons of Ethics.

Opinions Below.

The opinion of the United States Court of Appeals is as yet unreported but it is set forth in full at pages 37-45, *infra*. No opinion was rendered by Palmieri, D. J. in denying petitioner's motion for an injunction against the violation of Canon 10, but his order with findings of fact and conclusions of law is set forth at pages 20a-23a of Appellant's (Blue) Appendix to the Court of Appeals. An opinion was rendered by Herlands, D. J., which is reported in 163 Fed. Supp. 548 and the opinion is set forth in full in the Appellant's (Yellow) Appendix to the Court of Appeals at pages 42a-82a thereof.

Jurisdiction.

The judgment of the United States Court of Appeals sought to be reviewed was entered on February 20, 1959, and the jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

The jurisdiction of the United States District Court for the Southern District of New York in the action in chief was predicated upon diversity of citizenship, the Copyright Laws of the United States (Secs. 1331, 1332, 1338 and 1400-28, U. S. C.), unfair competition, and the Anti-Trust Laws of the United States (Title 15, Sec. 15, U. S. C.).

The jurisdiction of the United States District Court on the motions for injunction was predicated upon General Rules for the Southern District of New York, Rule 5(c), which provides that "Professional misconduct shall include * * * a failure to abide by the provisions of the Canons of Ethics of the American Bar Association or the New York State Bar Association." The canons violated and the rulings of the American Bar Association thereon are set forth at pages 6-10, *infra*.

The jurisdiction of the United States Court of Appeals, Second Circuit, was predicated upon the automatic appeal provisions from an order denying an injunction contained in 28 U. S. C. Sec. 1292(1) and upon the decision of the said Court of Appeals in *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., 1956, 239 F. 2d 555, rehearing denied 2 Cir., 1957, 241 F. 2d 937, cert. den. 355 U. S. 824 (1957), which held that no distinction existed between orders granting or denying disqualification, and that since the orders had collateral finality they were appealable "within the class of orders described in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546." The *Harmar* case was reversed by the Court of Appeals, Second Circuit, by the judgment in the within action, Moore, Circuit Judge, dissenting on the ground that the orders are appealable and collaterally final.

Questions Presented.

1. Whether an order of the District Court denying a motion for an injunction restraining an attorney of record in pending litigation from acquiring an interest in said pending litigation in violation of Canon 10, Canons of Ethics, by purchasing the working control of a corporate defendant in the same litigation is an order which is appealable as of right to the United States Court of Appeals under the automatic appeal provisions contained in 28 U. S. C. Sec. 1292(1) or as an order having collateral finality under the decision of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

2. Whether an order of the District Court is similarly appealable to the Court of Appeals, which denied a motion for an injunction restraining a firm of attorneys who were the former attorneys for the plaintiff in the action from appearing in the action as attorneys for a defendant having a hostile interest to that of the plaintiff, where the matters in litigation are substantially related to the subject matter of the initial retainer of plaintiff (a violation of Canons 6 and 37 of the Canons of Ethics).

3. Whether the District Court had the right to pass upon the merits of the case in chief and to permit the disqualified lawyers to try the merits of the case in chief on affidavits on the motion for disqualification in the face of the "irrebuttable inference" rule of prejudice to the former client.

4. Whether the District Court erred in holding that a contract for the exploitation of cartoon characters known as "Popeye and the Thimble Theatre" negotiated by the plaintiff's former lawyer in 1932, may not be used as the basis of disqualification of said lawyer in pending litigation over the television rights of motion pictures pro-

duced under it because plaintiff assigned all right, title and interest in said motion pictures, characters and copyrights, where it clearly appears from the very contract of assignment that the plaintiff retained an "Equitable Servitude" on said motion pictures and copyrights requiring the payment to him of royalties from the commercial exploitation of the "characters" used in the motion pictures and the profits from their distribution.

5. Whether the purchase by attorneys Benjamin and Krim through their subsidiary United Artists Corporation (of which they are the "parent" under S. E. C. regulations) of a substantial block of stock of the defendant Associated Artists Productions, Inc., is champertous and in violation of Canon 10 of the Canons of Ethics and whether the plaintiff is an aggrieved party entitled to move to restrain such violation of the Canons of Ethics.

6. Whether the corporate fiction is to be disregarded where it clearly appears that the attorney is the "parent" of the corporation under S. E. C. regulations and the former client is compelled in consequence to litigate with his own former attorneys the question of his right to obtain royalties on the commercial exploitation of the cartoon characters created by him under the contract negotiated by his own former attorneys on his behalf.

The Statute Authorizing the Appeal to the United States Court of Appeals From Orders Denying an Injunction.

Section 1292, subdivision 1 of Title 28, United States Code, provides:

> Interlocutory decisions.
>
> "The courts of appeals shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts of the United States * * * or of the

judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court."

The Canons of Professional Ethics of the American Bar Association and the General Rule of the United States District Court Adopting Them Are as Follows:

General Rules of the United States District Court for the Southern District of New York, Rule 5(c):

"(c) Professional misconduct shall include . . . a failure to abide by the provisions of the canons of ethics of the American Bar Association or of the New York State Bar Association."

Canon 6:

"* * * *Adverse influences and Conflicting interests.* It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Canon 10, "Acquiring Interest in Litigation":

"The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 37

"*Confidences of Client*—It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyers employment and extends as well

to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences either for the private advantage of the lawyer or his employees or to the disadvantage of the client without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

The Rulings of the American Bar Association.

That the corporate fiction was to be disregarded, in arriving at a conclusion that an attorney violated Canon 10 in the purchase of shares of a corporation stock, was the opinion of the American Bar Association's Committee on Professional Ethics.

Opinion 246 (June 20, 1942) of the American Bar Association's committee is in pertinent part as follows:

> The opinion of the committee was stated by Mr. Jackson, Messrs. Phillips, Brown, Drinker, Houghton, Miller, and Brand concurring.
>
> (1) *Cannon 10* provides:
>
> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."
>
> The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services. *Cannon 10* is clearly violated.

In opinion No. 279 the American Bar Association's committee said:

"OPINION NO. 279

(June 18, 1949)

ACQUIRING INTEREST IN LITIGATION—*Where a corporation is organized by a lawyer for the purpose of filing with and prosecuting before the Federal Communications Commission an application for a radio broadcasting license, it is unprofessional for him to contract to accept stock in the corporation as his fee for prosecuting the application and resisting another applicant's claim to a license.*

A member of the Association submits the following inquiry: Where corporation A and the owner of an existing radio station have filed an application with the Federal Communications Commission for approval of transfer of control or assignment of license of the station to corporation A, can a lawyer, in view of *Canon 10*, purchase or subscribe for stock in corporation B organized for the purpose of filing a competing or counter application pursuant to Rule 1.321 of the Rules and Regulations of the Federal Communications Commission?

And the member supplemented that question by asking whether the lawyer could buy stock in the corporation or accept stock in the corporation as payment of his fee for legal services rendered to the corporation without violating *Canon 10*?

We understand the "legal services rendered" would be in connection with organizing the corporation, prosecuting before the Federal Communications Commission the corporation's application for a radio broadcasting license and resisting the granting of a license to another applicant.

Canons 10, 26, 28
Opinions 20, 176, 246

The Opinion of the Committee was stated by Mr. Jones, Messrs. Brand, Jackson, Miller, White, Wuerthner and Drinker concurring.

Canon 10 provides:

> The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

In construing that Canon we held in *Opinion 246* that it was improper for a lawyer to purchase stock in a corporation in order that he and his client (who owned a few shares of the corporation stock) together might hold enough stock to justify the expense of an audit in preparation of a stockholders' suit to be instituted by the lawyer. We said in that opinion:

> The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services. *Canon 10* is clearly violated.

And in *Opinion 176* we declared it to be improper for a lawyer to enter into an arrangement with a layman whose business was the purchase of legacies and interests in estates, under which the lawyer would investigate the interest to be purchased and after purchase collect it by litigation or otherwise, in consideration for which the lawyer would be given a share in the interest purchased. In that opinion we said:

> This practice offends two of the Canons of Professional Ethics—*Canon 10*, which prohibits a lawyer from purchasing any interest in the subject matter of litigation which he is conducting, and *Canon 28*, proscribing the stirring up of strife and litigation. It is true that litigation may never ensue, and that it is not in course of con-

duct at the time the purchase is made, but, in the opinion of the committee this does not alter the unprofessional nature of the transaction.

The views expressed in those two opinions apply to the instant question. Just as the purchase of corporation stock in *Opinion 246* and the receiving of a share of the interest in an estate in *Opinion 176* were violations of *Canon 10*, so would that rule of ethics be infringed if in the case under consideration the lawyer were to acquire the corporation's stock either by purchase or in payment of his fee. • • •"

Drinker, in his treatise, "The Lawyer's Obligation to His Client" says at pages 99-101, *inter alia*:

"This Canon must be read in connection with Canon 28 forbidding the stirring up of litigation, as part of the age-long policy which gave rise to the statutes against champerty, maintenance, and barratry. Its purpose is to prevent lawyers from the temptation to litigate on their own account. Significantly the Canon uses the word "purchase," not "acquire." "• • • The distinction is between buying an interest in the litigation as a speculation, which Canon 10 condemns, and agreeing, in a case which the lawyer undertakes primarily in his professional capacity, to accept his compensation contingent on the outcome." (99) "A lawyer may not properly • • • *buy an interest in a claim which he represents*" (see *Matter of Flannery*, 150 App. Div. 369, 388 (1912) (Costigan's Case Book, p. 281, n. 28 • • •" (100).

"*A lawyer may not buy stock in a corporation party to litigation, or advise others to do so.*" (101).

Statement.

In 1929 Louis Phillips was an attorney working for defendant Paramount Pictures, Inc. He was permitted a private practice outside of Paramount and formed a law partnership with an attorney named Louis Nizer to exploit these outside clients. The firm name of this partnership became Phillips & Nizer (App. 88a) (Yellow Appendix).

Although the precise day when Arthur Krim and Robert S. Benjamin became partners in the law firm of Phillips & Nizer does not appear, they were certainly partners from the year 1938 onward to the present day. The firm name has since been changed from Phillips & Nizer to Phillips, Nizer, Benjamin & Krim, all four being senior partners, who represented plaintiff from 1929 to 1941.

In 1929, plaintiff Dave Fleischer, and his brother Max Fleischer and their corporation Fleischer Studios, Inc. (then a New York Corporation), became clients of the recently formed law firm of Phillips & Nizer and remained their clients continuously until the year 1941. The Fleischers and their corporations were engaged in the production of motion picture cartoons which were released by the defendant Paramount Pictures, Inc., and its affiliates operating under various corporate titles all bearing the name "Paramount" (App. p. 88-a). Among the pictures produced by the Fleischers were the famous "Popeye" series, based on the characters of "The Thimble Theatre."

In 1932 the Fleischer brothers, Dave and Max, and Fleischer Studios, Inc., became interested in creating a series of motion picture cartoons based upon the cartoon strip character "Popeye" which was created by one Segar and the copyright owner of which was King Features Syndicate, Inc. (hereafter King Features). King Features desired certain representations and warranties as to distribution to be effected through Paramount which necessi-

tated consultation with the law firm of Phillips & Nizer, who also represented Paramount, so that such representation could be made by the Fleischers (App. 30a).

The King Features Syndicate contract with the Fleischers for the creation of the "Popeye" motion picture cartoons was negotiated for the Fleischers by their attorneys, Phillips & Nizer on November 17, 1932.

In his reply affidavit, sworn to November 15, 1932, at page 16 thereof (Rec. 421) Louis Phillips says the following:

> "It may very well be true that 25 years ago, in 1932, Phillips & Nizer represented Max Fleischer in negotiating the license agreement between King Features Syndicate and the Fleischer Corporation —although I have no recollection of such representation."

One of the terms of the negotiations related to the reversion to the producer, Fleischer Studios, Inc., of the subordinate characters created by them and the other to the use to be made by the Fleischers of the motion picture cartoons after the termination of the contract in 1938. The ownership of such subordinate characters and the right to exhibit the motion pictures after termination of the contract was assured to the Fleischers. (See exhibit annexed to affidavit of Dave Fleischer Rec. 376.)

It also became necessary for the Fleischers to create a "heavy" as a foil for the heroic exploits of "Popeye" and they conceived of, and popularized and became the owners of the copyrighted character "Bluto" who is as necessary to the success of the "Popeye" cartoons as yeast is to the baking of bread. It was the counsel and advice of the law firm of Phillips & Nizer which was needed and used by the Fleischers in the making of the contract with King Features and in the exploitation of "Popeye" cartoons and characters and the Fleischers not only relied

upon such advice (App. p. 32a) but made available to Phillips & Nizer all of their papers and records from the inception of their activities in the motion picture field since 1929 and made known to them their innermost confidences, all of which said firm seeks to disclose by an examination of the plaintiff in the action (App. 31a) (Yellow Appendix).

The one most instrumental in destroying the plaintiff rights in the "Popeye" and other characters in which the plaintiff and the Fleischer Corporation (Florida), have a 50 per cent interest is none other than Louis Phillips, their former trusted attorney and advisor, who has taken a position entirely hostile to his former clients, and the right to commercially exploit the "Popeye" characters including the heavy "Bluto" is now owned by Benjamin & Krim as parent of United Artists Corporation which company purchased the controlling stock of defendant Associated Artists Productions, Inc., one of the defendants in this action, who in turn acquired it from defendant Paramount without the obligations to pay royalties to the petitioner, despite the written obligation to do so.

There is thus shown a clear conflict of interest between the obligations assumed by Phillips & Nizer as attorneys for the Fleischers and their present hostile and destructive attitude with respect to plaintiff's rights under the King Features contract. There is a direct purchase of an interest in the subject matter of the litigation which Benjamin & Krim are conducting.

The November 17, 1932, contract between King Features and Fleischer Studios, Inc., is silent on the subject of the exploitation by television of the 119 "Popeye" cartoons produced under it. There is good reason for this silence. Indeed the art of commercial exploitation by television was unknown in 1932 and in an experimental stage, and the contract occupied the same position as "talking" motion

pictures did in the days of silent movies. The television rights therefore belonged to the Fleischers (see *Autry vs. Republic Productions*, 213 F. 2d 667 (9th Cir. 1954), for the 119 "Popeye" cartoons produced under the first contract. Regardless of the question in whom title to the commercial exploitation is vested, it was sold for $2,500,000, by the joint action of Paramount and King Features.

The King Features contract of November 17, 1932, under which 119 cartoons were made, was made for the production of "Popeye" cartoon motion pictures from the period commencing August 1, 1933 and ending on July 31, 1938.

The King Features contract was extended on February 17, 1937, for five years commencing July 31, 1938.

On February 17, 1937, King Features and Fleischer Studios, Inc., entered into a renewal contract for the production by Fleischer commencing with July 31, 1938, of twelve additional "Popeye" cartoon motion pictures a year for five successive years until July 31, 1943. Nothing in the February 17, 1937, contract took away from the Fleischers their absolute rights in the characters created by them in the prior 119 "Popeye" cartoon motion pictures, such as the heavy "Bluto," nor were their rights to televise the said 119 "Popeye" cartoons previously produced, in any way interfered with, limited, whittled away or even questioned by either King Features or Paramount. However for the first time in the February 17, 1937, King Features contract, the parties attempted in paragraph FOURTH (Rec. p. 615) to define their respective television rights in the future production of "Popeye" motion picture cartoons and the reservation to Fleischer of the rights theretofore granted was assured.

A suit by Joseph Kallus v. Fleischer Studios, Inc., was commenced February 23, 1938, in which Phillips & Nizer appeared as attorneys for the Fleischers, seeking an ac-

counting for the King Features royalties, in which there was a complete disclosure of confidences covers the exact area and documents sought to be explored by Phillips, Nizer, Benjamin & Krim, as attorneys for the Paramount defendants in the present action.

On April 15, 1938, the defendant Fleischer Studios, Inc., made and served its answer through the law firm of Phillips & Nizer. All of the contracts and statements and records of Fleischer Studios, Inc., were turned over in utmost confidence to the said law firm of Phillips and Nizer to assist them in defending the action. Plaintiff in said action Joseph L. Kallus sought such information and his application for such relief was opposed in an affidavit submitted in the said court by Arthur R. Krim, one of the attorneys who was then a member of the firm of Phillips & Nizer and is now a member of the firm of Phillips, Nizer, Benjamin & Krim. Mr. Krim stated in his affidavit, *inter alia* (App. p. 34), as attorney for the Fleischers:

> "*Plaintiff* SHOULD NOT BE PERMITTED TO INQUIRE INTO CONFIDENTIAL INFORMATION INVOLVING THE DEFENDANT (FLEISCHER) AND A THIRD PARTY" (italics and capitals Mr. Krim's).
>
> The defendant (Fleischer) objects to items "3" and "4" of the proposed examination before trial. In these items plaintiff seeks to inquire into the amounts paid by defendant to King Feature Syndicate Inc. and an independent third party, pursuant to license covering the Popeye Cartoons (App. p. 34).
>
> It is in the discretion of this court to determine the impropriety of these items. The plaintiff has made convenient allegations of an oral contract pursuant to which the defendant allegedly agreed to pay the plaintiff an amount equal to the sums paid by defendant to King Features Syndicate Inc. Under these convenient allegations the plaintiff now asks this court to enforce *the disclosure of the confidential information relating to transactions* between the defendant and this third party.

> It is respectfully submitted that before the plaintiff be permitted thus to pry into confidential matters, he be obliged to show at least the semblance of a valid cause of action (record on appeal p. 29 *Kallus v. Fleischer*)" (App. p. 35).

On July 25, 1938, Louis Nizer, the very member of the firm of Phillips, Nizer, Benjamin & Krim who signed the notice of taking depositions, and the production of the confidential papers which he and his firm obtained and still have in their possession as attorneys for Fleischer Studios, Inc., swore as follows:

> "This is an action for the reasonable value of work, labor and services and defendant is entitled to know what work, labor and services were performed 5 and ½ years ago for which he claims $120,000."

The brief on appeal was written by the firm of Phillips and Nizer, Louis Nizer of Counsel who argued the appeal and who in the conclusion of the brief says (App. p. 35):

> "It is of the utmost importance for defendant to know what plaintiff did almost six years ago which plaintiff now claims is reasonably worth $120,000."

On May 24, 1941, Fleischer Studios, Incorporated, a Florida corporation having in 1938 succeeded to all of the assets of a similarly named New York Corporation, entered into an agreement with Paramount Pictures, Inc., in which agreement Dave and Max Fleischer joined as parties, by which the 119 "Popeye" motion picture cartoons as well as the copyrights thereon were sold and assigned to Paramount. However by paragraph TWENTIETH of the said agreement there was reserved to the Fleischers a 50 per cent interest in the receipts from the commercial exploitation of the "characters created for or used in any of the new cartoons, in any manner and form and by any means whatsoever now or known or devised, • • • including but not limited to commercial and publicity tieups,

dolls, books, songs, records, designs for imprinting on fabrics and other materials, accessories of whatsoever nature, radio, TELEVISION PROGRAMS, and for use in, on or with commercial articles of whatsoever nature" (see Yellow Appellant's Appendix p. 101a).

It is this clause in the May 24, 1941, contract which furnishes the crucial determining factor on this petition because by the said agreement the Fleischers and Paramount agreed to and did produce twelve "Popeye" two-reel motion picture cartoons using the same "characters" as had been previously used in the 119 cartoons produced by the Fleischers under the King Features contract of November 17, 1932, which had been negotiated for the Fleischers by Louis Phillips.

In 1956 both Paramount and King Features Syndicate sold all right, title and interest in the "Popeye" cartoons to the defendant Associated Artists Productions, Inc., for $2,500,000 and that latter corporation is exploiting said motion picture cartoons without the intention of and without paying to the plaintiff any royalties whatsoever. It is the purchase of working control of the latter corporation which petitioner sought to enjoin by the motion for an injunction.

This suit was started in the month of October, 1957, for *inter alia* an accounting of profits arising out of the commercial exploitation of the "Popeye" characters. That is but one of the items of relief sought, but the most important.

On October 29, 1957, the law firm of Phillips, Nizer, Benjamin & Krim appeared in the action on behalf of Paramount Pictures, Inc., *et al.* (Appendix 2a).

On November 6, 1957, the plaintiff moved for "a permanent injunction, enjoining and restraining the law firm of Phillips, Nizer, Benjamin & Krim and any of the at-

torneys associated with said firm or their employees, agents, servants or clerks, from directly or indirectly engaging in, participating in, or being connected with in any manner whatsoever the prosecution of the within action or associating with counsel or attorneys for any of the defendants or the prospective defendants named in said annexed affidavit upon the ground that such action constitutes a violation of the canons of professional ethics * * *" (Yellow Appellant's Appendix p. 26a).

While said motion for an injunction was pending and undetermined before Herlands, D. J., Robert S. Benjamin and Arthur B. Krim, two of the members of the law firm above mentioned, as "parent" of United Artists Corporation (a designation made by their own attorneys, Paul, Weiss, Rifkind, Wharton & Garrison, to the Securities and Exchange Commission), purchased the working stock control of the defendant Associated Artists Productions, Inc., by purchasing 700,000 out of the 1,639,000 shares of its issued shares (Appellant's Blue Appendix pp. 8a-13a).

On December 27, 1957, petitioner Dave Fleischer obtained an order to show cause to enjoin the completion of said transaction and for a permanent injunction to prevent Benjamin & Krim from purchasing an interest in the litigation because it violated Canon 10 of the Canons of Ethics. Although no affidavits were submitted in opposition to the motion for an injunction by either Robert S. Benjamin or Arthur B. Krim, the motion for an injunction was denied by Palmieri, D. J., on January 8, 1958.

As to the motion for an injunction seeking disqualification extensive affidavits touching upon the litigation in chief were interposed by Louis Phillips in which he asserted that since the Fleischers had sold and transferred all of their interest in the 119 "Popeye" cartoons to Para-

mount by the May 24, 1941, contract, the earlier agreement of November 17, 1932, which he, Louis Phillips, had drawn as the Fleischer's attorney between them and King Features Syndicate was not "substantially related" to the issues in the present litigation and his law firm was therefore not disqualified.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR GRANTING THE WRIT.

1. The appeal from the denial of both injunctions was prosecuted as of right under 28 U. S. C. 1291(1) and the dismissal of the appeal was grievous error.

The basic misconception of Chief Judge Clark in his majority opinion holding that the orders were not appealable is that the basis of the motion is disqualification; "and the injunctive relief requested—that an allegedly champertous transaction be undone and the consummation of another prevented—is as collateral to the basic thrust of the motion as the incidental injunctive relief sought before Judge Herlands" (p. 38, *infra*, last sentence).

Over a century ago in *Arden v. Patterson* (New York Chancery Reports), 5, Johnsons Chancery Reports, page 44, Chancellor Kent held that the basic thrust against the enforcement of a champertous claim was by injunction saying:

> "This was a purchase by an attorney, • • • of a matter in litigation. • • • The purchase of a lawsuit by an attorney, in a case like this, is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. • • •" (p. 49).

> "I shall accordingly declare * * * that a perpetual injunction issue prohibiting the defendant P.(atterson) his agents etc., or any person for his use, from proceeding at law to enforce the judgment, so recovered * * *" (pp. 53-54).

Likewise disqualification or exclusion of an attorney is merely a different terminology for an injunction restraining an attorney and his servants or employees from appearing in a case. Chief Judge Clark says, "The real and only bite to each motion is the attempt to secure the *exclusion* of the lawyers from the case; and once disqualification is obtained, all else is superfluous" (p. 39, *infra*). But surely this is nought but semantics, for *to exclude, to restrain or enjoin are synonymous* (see Rogets Thesaurus, Crowell 1922, 751, 761). More can be done by the courts for the offense of champerty than to disqualify the lawyer from appearing in the action. It can undo the transaction *ab initio* and such was the prayer for relief. As an injunction motion whether granted or denied the orders were automatically appealable under 28 U. S. C. Section 1291(1), and this would be true whether the proceeding were collateral to the main case or inclusive within it.

2. The intramural controversy among the judges of the United States Court of Appeals, Second Circuit, as to the appealability of an order denying an injunction against the appearance of a lawyer in an action involving his former client or refusing to disqualify said lawyer is hardly conducive to the orderly administration of justice and there is a crying need for finality of decision by this court to set the dispute at rest.

Certainly the public as well as the bar have a right to know with some degree of certainty whether an appeal lies as a matter of right from an order denying an injunction against the appearance of an attorney in litiga-

tion adverse to his client or seeking to enjoin the purchase of an interest in the subject matter of the litigation. In the case of *Harmar Drive-In Theatres v. Warner Bros. Pictures*, 2 Cir., 239 F. 2d 555, cert. den. 355 U. S. 824, at the insistence of Louis Phillips, the lead counsel of the motion picture industry, the Court of Appeals decided that such an order was appealable, Swan, C. J., writing for the majority and Clark, C. J., dissenting in a vigorous opinion.

As late as December 30, 1958, the Court of Appeals, Second Circuit, in the case of *MacAlister v. Guterma*, F. 2d (New York Law Journal, Feb. 13, 1959), in a unanimous decision by Kaufman, D. J., and concurred in by Swan and Moore, C. JJs., affirmed its *Harmar* decision as an effective authority.

Now less than two months later, when Louis Phillips and his partners are involved on the other side of the question, the Court of Appeals per Clark, C. J., has overruled its *Harmar* decision with Moore, C. J., dissenting, and saying (p. 43, *infra*):

> "The disqualification question is wholly collateral to the issues in the litigation and should not be mingled with matters which will be resolved only in a final judgment on the merits. Orderly and expeditious trial procedure would scarcely be achieved were a lengthy trial to be held which might be reversed on appeal were it determined that defendants' attorneys should have been disqualified. The time spent in seeking an adjudication on the merits would have been wasted because of an error unrelated to the issues in the case. This court in *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir. 1956, 239 F. 2d 555, rehearing denied 2 Cir. 1957, 241 F. 2d 937, cert. den. 355 U. S. 824 (1957), held that an order disqualifying an attorney had elements of collateral finality and hence was 'within the class of orders described in *Cohen v. Beneficial Industry Loan Corp.*, 337 U. S. 541, 546.' The ma-

> jority were of the opinion that with respect to appealability no distinction exists between orders granting disqualification and those refusing to do so' (p. 556). Accordingly the court concluded that the order was appealable."

3. For the District Court and Court of Appeals to have permitted Louis Phillips, the lead lawyer for the motion picture industry, to try the merits of the case in chief on affidavits in opposition to the motion to enjoin his participation in the case in the face of the "irrebuttable inference" rule of prejudice adopted by said courts at his insistence as such lead counsel, is shocking to the "Equal Justice for All" principle. It would appear that the rule is enforced when great and powerful interests require its enforcement and relaxed when it is detrimental to them.

In *Laskey v. Warner Bros.*, 224 F. 2d 824 (1955), cert. den. 350 U. S. 932, and *Harmar Drive-In Theatre v. Warner Bros., supra,* the Court of Appeals, Second Circuit, again at the urging of Louis Phillips, the lead counsel for the motion picture industry, adopted the "irrebuttable inference" rule in disqualification cases which establishes a presumption that confidential information, material and relevant to issues was given to the former attorney if the issues and subject matter of the former retainer or litigation is substantially related to the issues and subject matter of the present case.

This rule is defined by Swan, J., in the *Harmar* case as follows:

> "True, the Court spoke of an 'irrebutable infetence,' but we take that what was meant was that the Court should not pass upon that issue just as it will not pass upon the question whether an express trustee who buys the *trust res* for himself has in fact gotten any advantage in the sale from a trustee."

We certainly do not question the soundness of the rule, and urge its application to this case. The rule is of such salutory importance that it has been adopted by all important writers on the subject so as to become the touchstone of attorney-client relations dealing with the obligation of the former attorney not to purchase an interest in his former clients' cause or to adopt a position in a lawsuit as counsel for a hostile interest opposed to that of the former client. The sanctions for the violation of Canons 6 and 37 of the Canons of Ethics are severe. (See notes—Sanctions for Attorney's Representation of Conflicting Interests—Columbia Law Review, Nov., 1957, Vol. 57, No. 7, p. 995—Note, Disqualification of Attorneys Representing Interests Adverse to Former Clients, 64 Yale L. J. 917 [1955]. Kaplan, Forbidden Retainers, 31 N. Y. U. L. Rev. 914—Kaufman, 70 Harvard Law Review 657 [1957].)

In the instant case not only was the "irrebutable inference" rule disregarded, but the attorney Louis Phillips, chiefly responsible for its adoption, was permitted to try the case on the merits upon a false issue of fact and law concerning the reserved royalty rights of the Fleischers in and to the motion pictures which had been assigned to Paramount but subject to the obligation to pay the Fleischers royalties in the future and to account for the proceeds from their commercial exploitation.

The practice of the District Courts of trying the merits of litigation in chief on the hearing with respect to collateral issues was condemned by this Court in *Smith v. Sperling*, 354 U. S. 91, where Douglas, J., writing for the majority, said:

> "To stop and try the charges of wrongdoing is to delve into the merits. That does not seem to us to be the proper course. It is a time consuming, wasteful exertion of energy on a preliminary issue in a case. The instant case is a good illustration,

for it has been over eight years in the courts on this question of jurisdiction. * * * Obviously federal law would govern the preliminary trial on the issues of wrongdoing for that matter goes to the question of federal jurisdiction. Yet should the District Court decide those issues in favor of the stockholder, a second trial on the merits will require that the same issues be tried out according to the set rules supplied by local law.

"It seems to us that the proper course is not to try out the issues presented by the charges of wrongdoing but to determine the issues of antagonism on the face of the pleadings and by the nature of the controversy."

The "irrebuttable inference" rule required that the inquiry be stopped once the relationship on the substantially related issue was disclosed and it was grievous error to permit Louis Phillips to explore the litigation on the merits. He thus defeats disqualification by defeating the action on the merits, and is using his victory so obtained to obtain a dismissal of the action in the District Court.

4. Judge Herland's decision which denies to the Fleischers an equitable servitude in the copyrighted motion pictures cartoons directed, composed and produced by them, despite the reservation of royalties to them, flies in the face of the unanimous decisions of the State of New York under whose laws the contract is to be interpreted and of the United States Court of Appeals for the Second and Sixth Circuits and if upheld destroys the implied rights of every producer, director, author or composer to have his copyrighted product worked for his benefit.

The crucial King Features contract of November 17, 1932, which defined the residual rights of the Fleischers in the "Popeye" characters and cartoons, 119 in number, concededly drawn by Louis Phillips as attorney for the

Fleischers, has been held to be unrelated by Herlands, J. This decision on the merits was predicated upon the false affidavit of Louis Phillips, who alone asserts that King Features contract has no relation to the subsequent sale of the television rights by King Features and Paramount for $2,500,000. Such false assertion appearing in Mr. Phillips' affidavit at page 22, folios 64-66, of the Appellees' Appendix, was adopted in its entirety by Judge Herlands in the face of the clear reservation of the residual rights to the Fleischers of a 50 per cent interest in the commercial exploitation by television of the characters created for use or used in the new cartoons.

In re Waterson, Berlin & Snyder Co. v. Irving Trust Co., 48 Fed. 2d 704, the United States Circuit Court, Second Circuit, said per Augustus N. Hand, J.:

> "Courts of the United States have enforced rights resembling an equitable servitude binding on a third party who has acquired personal property from one who is under a contract to use it for a particular purpose or in a particular way" (p. 708).

Although the contract of May 24, 1941, is personal to the parties and non-assignable without the consent of the petitioner Dave Fleischer who is a party to it, even if we were to assume *arguendo* that the contract was assignable without his consent, his right to enforce the royalty provision as against the assignee is absolute. Continuing, the Court of Appeals said in the *Waterson* case:

> "But it is a different matter to say that the sale of the copyrights should be free from all equities on behalf of the composers. • • •"
>
> "It is true that the royalties on the songs are definitely provided to be paid only in the event of publication by Waterson, Berlin & Snyder Company. • • • It seems to us equally unreasonable to suppose that the trustee may sell them free from all rights of the composers and thus deprive the latter of the only means of fixing the royalties which they

have been promised. In our opinion, while the copyright may be sold by the trustee, they should be sold subject to the right of the composers to have them worked in their behalf and to be paid royalties according to the terms of the contracts" (p. 710).

The Equitable Servitude doctrine relied upon by Circuit Court of Appeals Judge Augustus Hand in the *Waterson* case was first announced by Jessel M. R. in 1881 in the case of *Werdeman v. Societe Generale D'Electricite*, 19 Ch. Div. 246; 252. The doctrine of Equitable Servitude and the *Waterson* case was approved by the United States Court of Appeals, Sixth Circuit, Hicks, J., in *Kenyon v. Automatic Instrument Co.*, 160 F. 2d 878, 884. Said Judge Hicks:

> "'How * * * it can be argued in a Court of Equity that an assign can take a patent with notice of that arrangement and keep all the profits himself, I am at a loss to understand.' The quotation from Jessel M. R. embodies the crux of this case."

The *Waterson* case was approved by the unanimous U. S. Court of Appeals, Second Circuit, in *Standard Oil Co. v. Clark*, 163 F. 2d 930, with Clark, C. J. (who voted to dismiss the appeal in the within action), writing the opinion of the Court sustaining the principle of Equitable Servitude.

The contracts between the Fleischers and Paramount all provide that they are personal and non-assignable and to be interpreted according to the laws of the State of New York and the New York case law has adopted the principle of Equitable Servitude embodied in the *Waterson* decision in the case of *Broadcast Music Co. v. Taylor*, 10 Misc. 2nd 21, where Pecora, J., said:

> "It was a breach of its contract and a breach of trust as well for Marks to attempt to cut off the rights of the composer."

It has been held by the U. S. District Court for the Southern District of New York *In re McBride*, 132 F. 285 (1904), that where as in the instant case the contract is non-assignable without the consent of the author, composer or creator of the literary material that neither the copyright nor its material may be transferred without his consent to a stranger.

The doctrine of Equitable Servitude, first pronounced by Jessel M. R. has over the greater part of the Twentieth Century had the almost unanimous approval of scholars and textbook writers.

The doctrine of "Equitable Servitudes on Chattels" is discussed in an article by the late Professor Chafee in Vol. XLI, Harvard Law Review, June, 1928, pp. 945, 954, where it will be found that he quotes with approval the decision of Jessel M. R. in the *Werderman* case. The latter case is discussed with approval in a Note on Equitable Servitudes on Chattels 32, Har. Law Review, p. 278, in a note entitled Copyrights-Restitution on the Bankruptcy of the Publisher (*In re Waterson, Berlin & Snyder Co.*), Illinois Law Review, 25:204-206 (Chicago, June, 1930), and in an article, Equitable Servitudes, Creation and Kinds—Obligation to Work Copyrights and Pay Royalties, Harvard Law Review, 45:586-587 (1945).

In the Note to 31 Columbia Law Review, page 1335 (1931) at 1344, titled Equitable Liens, it is said by way of conclusion:

> "Two explanations of the *Waterson* decision suggest themselves. It may be that the court in recognizing that Equitable Servitudes on chattels may exist, imposes a lien to avoid the difficulty of framing an injunction which would be adequate to enforce the servitude if at a later date the purchaser of the copyright fails to abide by it. Or it may be that by using the respectable device of a lien to give the composers rights in the property itself, the court

> is thus seeking to cloak its acceptance of novel doctrine. In either case this use of the equitable lien if not unprecedented, is extraordinary and albeit in a narrower sphere, indicates a principle of relief hardly less important than that of *Lumley v. Wagner*."

Where a decision of a United States District Court which if permitted to stand will destroy the rights of thousands of authors, writers, directors and producers to receive royalties on their work product which they have assigned to motion picture companies in the hope of receiving such royalties and such decision is contrary to the unanimously accepted body of case law throughout the country and the State of New York, whose law is to be used as a basis of decision, it is submitted that this Court should pass upon the question to lend finality of decision in this important field of copyright law.

The extent to which Judge Herlands' decision destroys the rights of the Fleischers and with it the rights of all authors, composers, producers and directors of motion pictures who have been unfortunate enough to transfer their copyrighted works to motion picture corporations in exchange for the right to obtain royalties is illustrated by his decision where he says in pertinent part (Appellant's Yellow Appendix, pp. 60a-63a):

> "The May 24, 1941 agreement transferred to Paramount the Fleischers' property interest in all of the movie cartoons that they had owned or made prior to the date of the contract. As to 'new cartoons,' the Fleischers had a fifty per cent net profit participation as defined in the contract. This profit-sharing provision referred to the 'new cartoons' and the word 'characters,' so as to encompass the use in such new cartoons of both old characters (i. e., those characters that had been used prior to May 24, 1941) and newly created characters. The distinction is between 'cartoons' and 'characters,' the cartoon being an animated portrayal

of one or more characters. The May 24, 1941 contract further provided that, where a character is used in a new cartoon and is also exploited by use other than by movies (such as use on television, in advertising, dolls, etc.) the Fleischers would have a share of the profits resulting from such exploitation.

"Under the *1937* license agreement between the Fleischers and King Features Syndicate, Inc., the Fleischers, by express prohibition and exclusion, did not have the right to use on television, the movie cartoons that they had made or would make under and pursuant to the *1937* license agreement. However, plaintiff now contends that (regardless of the 1937 agreement just mentioned) the Fleischers had the right—based on the 1932 license agreement—to use on television both the characters and the movie cartoons that they had used and produced during the years 1932 through 1937, when they were operating under the *1932* license agreement. The 1932 license agreement did not refer to the subject of television; hence, plaintiff now argues that there was no restriction under the *1932* license agreement on the Fleischers' use of characters or cartoons on television.

"The next branch of plaintiff's argument concerns the scope or coverage of the word 'exploitation,' as used in the 1941 contract. Plaintiff argues that, when Paramount used on television the old movie cartoons (i. e., those produced by the Fleischers during the period from 1932 through 1937) *and* such old movie cartoons contained a 'character' that was also used in one of the new cartoons made after May 24, 1941, the use of such old movie cartoons after May 24, 1941 constituted 'exploitation' of a character within the meaning of the 1941 contract. Plaintiff then concludes that the Fleischers are entitled to profit-share in the use of such old movie cartoons.

"The fallacy of plaintiff's argument is that it blandly overlooks the explicit assignment by the Fleischers to Paramount in the 1941 agreement of all of their interest in and to the old movie cartoons.

Having expressly divested themselves of all interest in the old movie cartoons, the Fleischers cannot now use the 'exploitation' provision as a device to retain a profit interest in that which they completely surrendered to Paramount.

"Mr. Phillips had nothing to do, as Fleischers' attorney, with either the 1937 license agreement with King Features Syndicate, Inc. or the 1941 contract with Paramount. Therefore, in order to tie in Mr. Phillips for purposes of the pending cross-motion, plaintiff resorts to *the 1932 license agreement between the Fleischers and King Features Syndicate, Inc., in connection with which Mr. Phillips did represent the Fleischers.* Following up the latter point, plaintiff then attempts to show that the 1932 license agreement is substantially related to the issues of the present case. The threads of plaintiff's argument, so far as they may be woven into a coherent thesis, are: the 1932 license agreement contained no restriction, express or implied, as to the Fleischers' use on television of characters or cartoons, and that—contrary to Mr. Phillips' present contention—the 1932 license agreement should be interpreted as permitting the Fleischers to use on television the characters and cartoons made during the years 1932 through 1937. The subsequent 1937 license agreement, as noted, while prohibiting the Fleischers' television use of cartoons made under the 1937 license agreement, did not forbid the Fleischers' television use of characters and cartoons made prior to the 1937 license agreement. Since Mr. Phillips represented the Fleischers in the 1932 license agreement, and since Mr. Phillips now takes a position contrary to that of his erst-while clients vis-a-vis the 1932 agreement—an agreement that he negotiated professionally for the Fleischers—plaintiff concludes that Mr. Phillips should be disqualified.

"The fallacy of this argument is that the Fleischers no longer have a property interest in the old cartoons produced between 1932 and 1937, because they expressly transferred whatever rights they had in such old cartoons to Paramount by the 1941 contract. If arguendo plaintiff has any tele-

vision rights in the new cartoons or characters, such rights could not be based on the 1932 agreement, in view of the 1941 transfer. Consequently, the open issue for litigation involves the interpretation of the 1941 contract. As will be pointed out in detail below in this opinion, plaintiff himself expressly stated that the vital issue herein is the interpretation of the 1941 contract. The interpretation of the 1932 license agreement, therefore, does not have any relevancy and materiality to any current issue, for howsoever it may be interpreted as defining the rights of the Fleischers, those rights were fully and completely transferred to Paramount. *The Court concludes that Mr. Phillips' contract with the 1932 agreement may properly be disregarded for purposes of the present motion, because that agreement has no substantial relationship to any current issue.*

"With respect to the issues raised under the first cause of action, the Court clearly concludes that there is no basis to disqualify Mr. Phillips and his partners." (Italics supplied.)

5. The purchase by Attorneys Krim and Benjamin through their subsidiary United Artists Corporation of a substantial block of stock constituting working control of defendant Associated Artists Productions, Inc., is a clear violation of Canon 10 of the Canons of Professional Ethics. It is champertous, contrary to public policy and this Court has power and duty to enjoin its consummation at the suit of an aggrieved party such as the plaintiff herein.

a.) The Court should pierce the corporate veil to determine the real identity of the purchasers as well as the sellers.

In the case of *Harmar Drive-in Theatre, Inc., v. Warner Bros.*, 239 F. 2d 555, the attorney against whom disqualification was sought, claimed that since the corporate

identity of his clients was different from those represented by his former partner, disqualification should be denied. This Court ruled in both the majority opinion of Swan, J., and the dissenting opinion of Clark, C. J., that the corporate veil must be pierced to determine the beneficial ownership and actual control.

Swan, J., writing the majority opinion said:

> "Moreover, if the two plaintiffs at bar were identical in interest with the three just mentioned, we cannot believe that it makes any difference that they are separate corporations. If the beneficial ownership of all the corporations is the same and the disqualification, imputed to the innocent partner, lasts after the dissolution of his partnership with Isacson, there is just as much reason to suppose that defendants at bar will suffer in the defense of the instant actions as in the defense of the other three actions. Therefore as to 'Colonial', which is completely controlled by the Sterns, Malkan is disqualified. As to 'Harmar', the situation is not quite so clear. The Sterns owned only half the stock but it was they who engaged Malkan. Under these circumstances we think that the situation called on him to show that the Sterns did not control 'Harmar' and this he did not do. We hold him disqualified also in the 'Harmar' action."

Clark, C. J. (dissenting), said:

> "Defense counsel very shrewdly suggested that here all we had to do to find identity was to look through the corporate control to the real ownership. If that were all, I should of course agree."

Here the purchase was made by the Krim and Benjamin group controlling United Artists Corporation of 700,000 shares of the outstanding 1,700,000 shares of A. A. P. stock from the Chesler group. This huge block constitutes working control of A. A. P. and makes of Krim and Benjamin the dominant or controlling group of stockholders as defined by Douglas, J., in *Pepper v. Lytton*,

308 U. S. 295, 306, and *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 492 (see Louis Loss—Securities Regulation p. 458, Determinants of Control). Even Mr. Seymour M. Peyser states that "United Artists began its negotiations looking toward the acquisition of A. A. P. shares *or its underlying assets* • • •". The underlying assets would of course be the "Popeye" and Warner Bros. film library, both of which constituted its main and underlying assets. Evidently it proved more practical and to the financial advantage of the sellers to have a tax free sale of corporate stock effected in Toronto, Canada, where the stock transfer agent of defendant A. A. P. is located. Consequently the sale of shares was consummated in Toronto rather than the sale of the underlying physical assets.

b.) The purchase by Attorneys Krim and Benjamin through their subsidiary, United Artists, is champertous and against public policy and the consummation of the purchase should be enjoined by this Court.

Under the subheading Origin and History of Champerty and Maintenance, 11 Corpus Juris, 234, the general rule is stated as follows:

> "[§6] A. *Existence under Roman Law.* By the Roman Law it was a species of *crimen falsi* to enter into any confederacy or to do any act to support another's lawsuit, by money, witnesses, or patronage.
>
> [§7] B. *Early English Doctrine* 1. *At Common Law.* According to the better doctrine, the various statutes enacted in England concerning champerty and maintenance were in substance merely declaratory of the common law, the fundamental principles of the law on this subject being well established prior to the statutes. The offense has always been considered as one against public justice, and as having a manifest tendency to oppression and the

general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which could disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. *The power of influential persons to whom rights of action were transferred in order to obtain their support and favor in suits brought to assert those rights was the cause of the rigid doctrine of the early common law.* (Italics supplied.)

"[§8] 2. *In Equity.* The court of chancery in the main followed the courts of law in treating champerty and maintenance in all its forms as illegal and went further in some respects, giving relief against, and refusing to enforce, transactions not strictly involving champerty or maintenance, but savoring of it."

One of the earliest but leading cases showing the exercise by a Court of Equity of its injunctive powers to restrain the enforcement by an attorney or his nominee of an assignment of a right of action purchased by the attorney, is the case of *Arden v. Patterson* (New York Chancery Reports 5, Johnsons Chancery Reports page 44) in which the opinion was written by Chancellor Kent.

c.) Plaintiff is an aggrieved party and has standing to seek and enforce the injunctive relief sought by these proceedings.

In the prayer for relief under the first cause of action contained in the amended complaint, plaintiff seeks an injunction, against the commercial exploitation of the Popeye characters contained in the 119 Popeye cartoons made by the Fleischer Studios, Inc., or Fleischer Studios Incorporated, an accounting of profits and a decree requiring the defendants Paramount Pictures, Inc., and Paramount Pictures Corporation to repossess and de-

fendants, A. A. P., Inc., and Associated Artists Productions, Inc., and any of their agents, servants, employees, successors and assigns to deliver up and surrender to the Court or to an agent to be appointed by the Court, all negatives and positives of the "New Cartoons" including the Twelve Popeye cartoons * * *."

It is not denied that Phillips & Nizer were the attorneys who drew the basic agreement between King Features Syndicate, Inc., and the Fleischer Corporation as attorneys for the plaintiff, the construction of which agreement will in great measure be determinative of the rights of the parties (see concession of Louis Phillips as follows: "It may very well be true that 25 years ago, in 1932, Phillips & Nizer represented Max Fleischer in negotiating the license agreement between King Features Syndicate and the Fleischer Corp." [rec. 421]).

Arthur Krim, then a member of the firm of Phillips and Nizer, in the years 1938 to 1940 inclusive was the attorney who handled the litigation between Joseph Kallus and Fleischer Studios, Inc. (see *Kallus v. Fleischer*, 225 App. Div. 812) which involved a claim for $120,000 commensurate with the royalties paid by the Fleischer to King Features Syndicate. In said suit confidential disclosures were made to Krim as to all contracts with, royalties paid to and negotiations with King Features Syndicate and such confidential information are the basis of the preferred position of Krim and Benjamin in making their purchase from A. A. P. (see Dave Fleischer app. pp. 31a-37a).

Plaintiff should not be required to litigate with his own former attorneys as litigants in a field where the confidential relationship is fraught not only with the possibility but with the actuality of fraud, overreaching and undue advantage taken of the client by his former attorneys.

For the foregoing reasons this petition for a writ of certiorari should be granted.

GUSTAVE B. GARFIELD,
Attorney for the Petitioner Dave Fleischer,
122 East 42nd Street,
New York 17, N. Y.

April, 1959.

Opinion of United States Court of Appeals for the Second Circuit.

No. 58—October Term, 1958.

(Argued January 6, 1959 Decision February 20, 1959.)

Docket No. 25152

DAVE FLEISCHER, individually and as Trustee in dissolution of Fleischer Studios, Incorporated,
Plaintiff-Appellant,

v.

LOUIS PHILLIPS, *et al.* (Phillips, Nizer, Benjamin & Krim),
Respondents-Appellees.

Before:

CLARK, Chief Judge.
MOORE, Circuit Judge, and GIBSON, District Judge.

Appeals from the United States District Court for the Southern District of New York, William B. Herlands and Edmund L. Palmieri, Judges.

Plaintiff appeals from orders denying motions to disqualify respondents as counsel for several defendants in a pending action and for injunctive relief. Appeals dismissed.

Gustave B. Garfield, New York City, for plaintiff-appellant.

Seymour Shainswit, of Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for appellee Louis Phillips.

Simon H. Rifkind, of Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Edward N. Costikyan, of Paul, Weiss, Rifkind, Wharton & Garrison, New York City, on the brief), for appellees Robert S. Benjamin and Arthur B. Krim.

Daniel Huttenbrauck, of Mendes & Mount, New York City, for appellees A. A. P., Inc., and Associated Artists Productions, Inc.

CLARK, Chief Judge:

These are appeals from orders which deny plaintiff relief sought against respondents, defense attorneys in his pending action against Paramount Pictures, Inc., and other motion picture producers and distributors. Though respondents have not raised the issue, we must first decide whether the orders are appealable and give us jurisdiction for review. In substance the primary relief sought in each motion was the disqualification of the firm of Phillips, Nizer, Benjamin & Krim, which has represented defendants Paramount Pictures, Inc., Paramount Pictures Corporation, and Flamingo Films, Inc. Before Judge Herlands plaintiff contended that Louis Phillips of that firm had formerly represented plaintiff in matters relevant to this litigation, and sought an order barring the firm from the action and enjoining it from representing defendants while disqualified. The motion before Judge Palmieri was in form an application solely for an injunction *pendente lite*; disqualification was not requested. But the basis of the motion—that members of the law firm had allegedly acquired and were intending to acquire an interest in the subject matter of the action in violation of Canon 10 of the Code of Legal Ethics—was one which if substantiated most certainly would have resulted in counsel's disqualification; and the injunctive relief requested—that an allegedly champertous transaction be undone and the con-

summation of another prevented—is as collateral to the basic thrust of the motion as the incidental injunctive relief sought before Judge Herlands. The real and only bite to each motion is the attempt to secure the exclusion of the lawyers from the case; and once disqualification is obtained, all else is superfluous. Hence the prayers for injunctive relief add nothing to the orders denying the motions and render neither of them automatically appealable under 28 U. S. C. §1292(1). *Federal Glass Co. v. Loshin*, 2 Cir., 223 F. 2d 100, 101. See also *Morgenstern Chemical Co. v. Schering Corp.*, 3 Cir., 181 F. 2d 160; *Albert v. School Dist. of Pittsburgh*, 3 Cir., 181 F. 2d 690, 691; *American Airlines v. Forman*, 3 Cir., 204 F. 2d 230; *District 65, Distributive, Processing and Office Workers Union of New York and New Jersey v. McKague*, 3 Cir., 216 F. 2d 153; *Wallace Products v. Falco Products*, 3 Cir., 242 F. 2d 958; *Division 689, etc., v. Capital Transit Co.*, D. C. Cir., 227 F. 2d 19; 6 Moore's Federal Practice 49-51 (2d Ed. 1953).

Accordingly, these appeals can be justified only if the orders are within the class made appealable by *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546. But surely this dreary and acrimonious proceeding, which has so overwhelmed the substance of this litigation that we are not told and are uncertain what the action is all about, does not arise from orders within "that small class which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Indeed, the motion before Judge Palmieri involves no claim of right by plaintiff. The allegedly champertous transactions made the basis of that application caused no direct injury to plaintiff; plaintiff's status on that motion seems to be comparable to that of any citizen or officer of the court calling to the attention

of the court a possible instance of misconduct occurring before it. And Judge Herlands' decision that no connection had been shown between Phillips' representation of plaintiff in the distant past and the issues involved in this litigation, though most thorough and persuasive, seems merely a procedural step, not of final character, and subject to reconsideration or change as new facts may develop. As pointed out in the *Cohen* case, 337 U. S. 541, 546, the very purpose of the "final" decision requirement of 28 U. S. C. §1291 "is to disallow appeal from any decision which is tentative, informal or incomplete."

In *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., 239 F. 2d 555, rehearing denied 2 Cir., 241 F. 2d 937, certiorari denied 355 U. S. 824, a divided court held that, since an order disqualifying an attorney had elements of collateral finality, there should be no distinction in an order refusing to disqualify. But surely that does not follow, for the finality of the two orders is as dissimilar as their results. An order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney; but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Here, as with a motion to dismiss an action or to grant summary judgment, while the affirmative grant of the requested relief is final and appealable, a mere refusal to act is necessarily less conclusive and ought not to be reviewed by this court. The ill effect of the *Harmar* ruling, which has presumably led to this wasteful appeal where the original issues are altogether lost, is even better demonstrated by that very case itself; the reversal there of the district court's orders led to lengthy delay in the progress of the litigation and ultimately to dismissal for failure to prosecute. Although we did recently reverse this dismissal as improvident, *Colonial Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., Jan. 26,

1959, the years spent in getting that case under way again ought not often to be repeated.

In this circuit in the past, powerful voices have been heard in support of interlocutory appeals and the continuing surveillance of trial court judges implicit therein. But research of a committee of the Judicial Conference of the United States, headed by the late great Judge Parker, disclosed that a majority of the federal judges were opposed to such a change and felt that the function of appeal was review, rather than trial supervision; and so the Conference limited its recommendations of new appellate jurisdiction to narrowly confined areas where both reviewed and reviewing judges felt that ultimate adjudication would be materially advanced. 28 U. S. C. §1292(b), effective Sept. 2, 1958. In the light of this experience and this enactment, the desirability of maintaining the settled federal principle against piecemeal appeals seems manifest. This is the position of a majority of the present active circuit judges shown in various rulings usually on motions which have not seemed to call for extensive opinion writing.[1] Hence upon principle and upon these more recent authorities we are constrained to hold the present orders not final for the purpose of appeal.

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[1] A late unreported decision of this character is that granting the motion to dismiss the appeal in *Echelman v. Grusmark*, 2 Cir., Dec. 12, 1958, rehearing denied Jan. 15, 1959, per Clark, Hincks, and Lumbard, JJ. The case illustrates the judicial view against expanding existing statutory grants of interlocutory appeals in specified instances—here that of orders in receivership proceedings, certain of which have been appealable under 28 U. S. C. §1292(a) (2). Other cases refusing to extend appealability in this area include *Garden Homes, Inc. v. United States*, 1 Cir., 200 F. 2d 299, 300; *United States v. Otley*, 9 Cir., 116 F. 2d 958; *Cookery v. Roberts & Mander Corp.*, 3 Cir., 189 F. 2d 234; *Skirvin v. Mesta*, 10 Cir., 141 F. 2d 668; *Grand Beach Co. v Gardner*, 6 Cir., 34 F. 2d 836; *Guardian Trust Co. v. Shedd*, 8 Cir., 240 F 2d 689. Reliance upon *Collins v. Miller*, D. C. Cir., 198 F. 2d 948, as being *contra* is not justified; under the unusual probate administration of the District of Columbia an action to remove an administrator must necessarily be instituted in the federal court and refusal of the remedy decisively terminates the proceeding.

Even though the case thus cannot be accepted on the merits, we have necessarily had to explore them to reach our conclusion; and because conduct of members of the bar has been so severely questioned, we note our concurrence with the conclusions of the two district judges that respondents have done nothing improper. The strictures are unjustified and unworthy.

Appeals dismissed.

GIBSON, District Judge (concurring):

I concur fully in Judge Clark's opinion dismissing these appeals. As a trial judge, I desire to point out that to follow the reasoning of the dissenting opinion will inevitably cause untold harm to one of the purposes causing the adoption of the Civil Rules of Federal Procedure. Rule #1, in part, says: "They shall be construed to secure the just, speedy and inexpensive determination of every action." The cause of just, speedy and inexpensive justice will be set far, far back if one construes these rules to enlarge the practice of piecemeal appeals. If one party can challenge the propriety of the other party's attorney—and such an order is held appealable, then that litigation must necessarily be delayed until this side question is passed on by the Appellate Court. The Trial Court is perfectly able to pass on any such question—and if required, can require new counsel to take over. The underlying philosophy of the minority opinion is to reinstate piecemeal appeals—that practice which still so dogs and delays and renders litigation expensive in many State Courts.

MOORE, Circuit Judge (dissenting):

In my opinion the order of Judge Herlands is appealable and should be affirmed. As a result of the denial of plaintiff's motion to disqualify the law firm of Phillips, Nizer, Benjamin & Krim from appearing as attorneys for the defendants the case will have to proceed to trial on the merits against the various defendants, represented by the same attorneys who had represented plaintiff in various matters. If such representation may be a violation of the canons of ethics so as to taint the entire proceeding this possibility should be tested at the threshold. The disqualification question is wholly collateral to the issues in the litigation and should not be mingled with matters which will be resolved only in a final judgment on the merits. Orderly and expeditious trial procedure would scarcely be achieved were a lengthy trial to be held which might be reversed on appeal were it determined that defendants' attorneys should have been disqualified. The time spent in seeking an adjudication on the merits would thus have been wasted because of an error unrelated to the issues of the case. This court in *Harmar Drive-In Theatre v. Warner Bros. Pictures*, 2 Cir., 1956, 239 F. 2d 555, rehearing denied 2 Cir., 1957, 241 F. 2d 937, cert. den. 355 U. S. 824 (1957), held that an order disqualifying an attorney had elements of collateral finality and hence was "within the class of orders described in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546." The majority were of the "opinion that with respect to appealability no distinction exists between orders granting disqualification and those refusing to do so" (p. 556). Accordingly the court concluded that the order was appealable.

The illustration used by the majority to demonstrate the difference between granting and denying a motion for summary judgment is inapposite. The granting of a motion for summary judgment terminates the action with finality,

whereas the denial reserves final decision for the trial. Issues collateral to the litigation are not being tested on such motions.

The philosophy of appealability expressed by the Supreme Court in the *Cohen* case, *supra*, is most applicable here. A comparison of the issues involved in the main litigation and those in this proceeding now on appeal illustrates how unrelated they are. An adjudication of the right of this law firm to remain as the attorneys for the defendants will not "make any step toward final disposition of the merits of the case and will not be merged in final judgment." The determination by the District Court on this motion resulted in the final disposition of a right "which is not an ingredient of the cause of action and does not require consideration with it" (*Cohen, supra*, pp. 546-547).

Here plaintiff is suing various corporations and an individual for wrongs allegedly perpetrated upon him by them. The disqualification of the attorneys selected by the defendants is wholly collateral to the issues in that case. Useful analogy is to be found in a proceeding to remove administrators. Were the administrators not removed the administratiton of the estate would have continued under their supervision. If this were improper it would have been "too late effectively to review the order" on final distribution of the estate (*Collins v. Miller*, D. C. Cir., 1952, 198 F. 2d 948, 950). The order dismissing the petition for removal was held appealable. So here the question of disqualification of defendants' attorneys can be decided upon facts which are not necessary or relevant to the issues upon which the final judgment must ultimately rest.

As to the merits of the motion to disqualify, the district court carefully and ably reviewed the facts. His conclusion that "[p]laintiff has failed to sustain his burden of proof of establishing a prima facie basis for said motion" is sound. Affirmance should dispose now and for always of

this highly collateral controversy. Mere dismissal of the appeal will permit this issue to remain alive only to be reactivated upon a possible future appeal in which the mingling of these diverse issues will create confusion. Consideration should also be given to the practical situation with which some future trial judge will be confronted in ruling on questions of admissible evidence. Plaintiff has had his day (even many days) in court on the merits of disqualification. He has lost on the merits and properly so in my opinion. If there be merit to the principal litigation it should be pursued and disposed of without further delay.